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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

TEXACO INC., AMERADA PETROLEUM CORPORATION, GULF OIL CORPORATION, JAKE L. HAMON, HUMBLE OIL & REFINING COMPANY, SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,

Petitioners,

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	15
Appendix A	1a

CITATIONS

Cases:

Amerada Petroleum Corporation, et al., Docket Nos. CI62-1544, et al., 28 F.P.C. 396	3
California Lumbermen's Council v. Federal Trade Commission, 115 F. 2d 178	8, 12
Communist Party of the United States v. Subversive Activities Control Board, 367 U. S. 1	7, 9, 10
Communist Party of the United States v. Subversive Activities Control Board, 254 F. 2d 314	7, 9, 11
Consolidated Edison Co. v. Nationa Labor Relations Board, 305 U. S. 197	7, 8, 9
Consolidated Edison Co. v. National Labor Relations Board, 95 F. 2d 390	8
Hershey Chocolate Corp. v. Federal Trade Commission, 121 F. 2d 968	8, 12
National Labor Relations Board v. Fairchild Engine & Airplane Corp., 145 F. 2d 214	8, 12
State of Maryland v. Baltimore Radio Show, 338 U. S. 912	13
Texaco Inc. v. Federal Power Commission, 290 F. 2d 149	13
Texaco Inc. v. Federal Trade Commission, 371 U. S. 882	12
Texaco Inc. v. Federal Trade Commission, 301 F. 2d 662	12
Wilson & Co. v. National Labor Relations Board, 103 F. 2d 243	8, 12

Statutes and Regulations:

	Page
Administrative Procedure Act, 5 U.S.C. 1005(c)	4
Federal Power Commission Regulations:	
18 C.F.R. 1.12(e)	4
18 C.F.R. 1.23	4
18 C.F.R. 1.28(a)	6
18 C.F.R. 1.36(c)	4
5 U.S.C. 1037(c)	8, 14
Federal Power Act, 16 U.S.C. 825g(1)(b)	8, 14
Federal Trade Commission Act, 15 U.S.C. 45(c)	8, 14
National Labor Relations Act, 29 U.S.C. 160(e)	8, 14
Natural Gas Act:	
15 U.S.C. 717m	4
15 U.S.C. 717r(b)	3, 5
Securities and Exchange Act, 15 U.S.C. 77(i)(a)	8, 14
Subversive Activities Control Act, 50 U.S.C. 793	8, 14

Miscellaneous:

Fifth Amendment to Statement of General Policy No. 61-1, 28 F.P.C. 441	4
Statement of General Policy No. 61-1, 24 F.P.C. 818	4, 5

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HUMBLE OIL & REFINING COMPANY,
SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,
Petitioners,

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered on June 24, 1963.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-5a, is reported at .... F. 2d .....

JURISDICTION

The judgments of the Court of Appeals granting motions to dismiss below were entered on June 24, 1963 (App.,

infra, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

If evidence proffered by a party to a Federal Power Commission adjudicatory proceeding is rejected, or if relevant evidence is withheld from a party by the Commission, does an appropriate court of appeals have jurisdiction, before issuance of the final agency order on the merits, to entertain an application and motion to adduce the rejected and withheld evidence, and, indeed, must not such action be entered promptly to avoid waiver of the Commission error?

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 831; 15 U.S.C. 717r(b) provides, in part, as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part . . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such

> additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order."

STATEMENT

There are now pending before the Federal Power Commission several adjudicatory proceedings involving individual applications by the several petitioners here for certificates of public convenience and necessity which would authorize the initiation of sales of natural gas in interstate commerce pursuant to petitioners' individually-negotiated contracts. These proceedings are designated as *Amerada Petroleum Corporation, et al.*, Docket Nos. G-62-1544, *et al.* It has become the practice of the Commission to consolidate for a single hearing a number of pending certificate applications proposing the initiation of sales in a general production area. The *Amerada* proceeding involves a number of applications for sales from the southern Gulf Coast area of the State of Texas and each petitioner here is a party applicant in that proceeding.

The *Amerada* proceedings were instituted pursuant to Section 7 of the Natural Gas Act and the Commission's order of August 30, 1962. This order provided in pertinent part:

> "In such a hearing all the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15 cent per Mcf price we found to be the in-line price as of September 28, 1960, the 16 cent

per Mcf price which is being adopted as the future area ceiling price for this area, or the 18 cent per Mcf price established on September 28, 1960." (P.R. 3a-4a)[1]

Having been informed that its contractual rights to certain prices were subject to "limitation" by prices published by the Commission in its *Statement of General Policy No 61-1*, 24 F.P.C. 818, and the *Fifth Amendment to Statement of General Policy No. 61-1*, 28 F.P.C. 441 (P.R. 7a-12a), Texaco instituted steps to ascertain the data relied upon by the Commission for the derivation of each of these price "limitations." The two Statements had been issued without record or hearing, and it was thus necessary to seek revelation of the data so that Texaco could properly prepare its case and intelligently comment on whether its sales prices should be "limited" by the prices cited by the Commission order. Texaco's efforts to reach this data and place it in evidence were made through an application for disclosure of these materials pursuant to the Commission's Rules, 18 C.F.R. 1.36(e), and for subpoenas *duces tecum* and *ad testificandum* to the Secretary of the Commission under the Natural Gas Act, 15 U.S.C. 717m, the Commission's Rules, 18 C.F.R. 1.23, and the Administrative Procedure Act, 5 U.S.C. 1005(c) (P.R. 16a-31a).

The Commission took no action on Texaco's motion for disclosure and subpoena, and after thirty days the motion was deemed denied under the Commission's Rules, 18 C.F.R. 1.12(e). Texaco promptly submitted an application for rehearing and reconsideration of this denial, pointing out the importance to it of knowing the data which would be used to condition and limit its contract rights so that it could

[1] "P. R." refers to the printed Petition and Appendix filed by petitioner Texaco Inc. in the Court of Appeals in No. 17,608. "M.R." refers to the mimeograph Petition and Appendix filed by petitioners in the Court of Appeals in No. 17,652.

properly participate in the hearing. (P.R. 41a-42a). By order of January 30, 1963, the Commission denied rehearing and refused production of the data (P.R. 44a-52a).

On February 11, 1963, Texaco petitioned the Court of Appeals for the District of Columbia for leave to adduce this additional data and for writ of mandamus or other appropriate relief, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) (P.R. 1). Judicial assistance was sought in reaching the data behind the "limiting" prices established by the Commission and in insuring acceptance of the data into the record of the certificate proceeding.

Although these efforts were directed toward reaching matters considered vital to the full preparation of its case, Texaco did proceed, in conjunction with the other petitioners here, to prepare such other evidence as it could from other available data. Petitioners gathered substantial evidence which they considered to be relevant to the issues of present or future public convenience and necessity as defined in the decisions of the courts, and the Commission's own prior decisions, and, particularly, the recitation of "relevant facts" relied upon by the Commission when promulgating its *Statement of General Policy* (P.R. 22a).

Included among the evidence prepared for presentation was:

(1) testimony and exhibits of a practicing geologist relating the gas production prospects of the pertinent producing area and a chronicle of the shift from shallow to deep gas production. (M.R. App., pp. 7-8).

(2) testimony and exhibits of a fuels economist showing projections of demand for natural gas, and thus, present demands on exploration and production companies (M.R. App., p. 9).

(3) testimony and exhibits of a consulting economist detailing national and regional trends in exploration and development, petroleum prices and costs, productivity of drilling and gas supply (M.R. App., pp. 10-11),

(4) testimony and exhibits of a producing company managerial witness computing reasonable current requirements for financing new supplies of natural gas (M.R. App., pp. 12-13).

(5) testimony of a production engineer comparing costs of drilling and completing old producing sources with problems and costs related to the bringing of new sources to market (M.R. App., p. 14).

All of this testimony and exhibit material was available on the day set for initiation of the hearing on petitioners' applications for certificates of public convenience and necessity. By ruling issued December 6, 1962, the Hearing Examiner rejected the tendered evidence. (M.R. App., pp. 53-75). Petitioners immediately sought an appeal from this ruling of the Hearing Examiner pursuant to the Commission's Rules, 18 C.F.R. 1.28(a). By letter dated January 12, 1963, the Secretary of the Commission rejected this appeal. (M.R. App., p. 76).

On February 19, 1963, petitioners filed their joint petition with the Court of Appeals for leave to adduce evidence (M.R. p. 1). Like Texaco's earlier filed petition for leave to adduce, this filing relied upon the specific language of Section 19(b) of the Natural Gas Act permitting a court of appeals to order that additional evidence be adduced. In each case the producers' efforts to secure and present evidence at an agency proceeding had been rebuffed, and believing that decisions of this Court, as well as decisions of courts of appeals, required immediate recourse by means of petitions to adduce, such relief was sought.

In each instance the Commission filed a motion to dismiss the petitions to adduce, and because of their similarity, the Court of Appeals heard and considered the cases jointly, issuing a single order on June 24, 1963, granting the Commission's motions and dismissing the petitions. Senior Circuit Judge Prettyman dissented to the dismissal.

Each of the judges expressly reserved the right to file an opinion or statement of his views, but only Judge Prettyman has done so — this in a memorandum of dissent filed on the day the order of dismissal was entered.

Judge Prettyman stated, *inter alia*, in his dissent:

> ". . . it seems to me we are bound by the ruling of the Supreme Court in the *Consolidated Edison* case.[1]
>
> . . . . . .
>
> ". . . It seems to me that the Supreme Court said quite clearly that if proffered evidence is rejected the profferor has an exclusive remedy, which is a motion in the Court of Appeals for leave to adduce the evidence, and if he does not make that motion he cannot raise the point upon a petition to review the final order."

---

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938)."
App., *infra*, pp. 2a, 4a-5a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with the decision of this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938); and the interpretation in *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

The decision of the Court of Appeals is in conflict with that Court's own decision in *Communist Party of the United States v. Subversive Activities Control Board*, 245 F. 2d

314; and with the decisions of the Third, Fourth, Eighth and Ninth Circuits in *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968; *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214; *Wilson & Co.* v. *National Labor Relations Board*, 103 F. 2d 243; *California Lumbermen's Council* v. *Federal Trade Commission*, 115 F. 2d 178, *cert. denied* 312 U.S. 709.

The decision of the Court of Appeals raises serious Constitutional questions since true due process of law requires a clear pronouncement of when court review must be sought to avoid waiver of the right to judicial review.

The decision of the Court of Appeals raises a fundamental question of the interpretation of the judicial review protections of not just the Natural Gas Act, but also, Federal Power Act, 16 U.S.C. 825 (1)(b); National Labor Relations Act, 29 U.S.C. 160(e); Securities and Exchange Act, 15 U.S.C. 77(i)(a); Federal Trade Commission Act, 15 U.S.C. 45(c); Subversive Activities Control Act, 50 U.S.C. 793; and the omnibus agencies act, 5 U.S.C. 1037(c).

1. Conflict with Decisions of this Court

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, this Court considered a proceeding brought to review a cease and desist order issued by the Labor Board. The government successfully argued both to the Second Circuit [95 F. 2d 390] and to this Court that the failure of the petitioners there to apply for leave to adduce the particular evidence foreclosed a later complaint that the Board's refusal to receive "highly important" evidence deprived them of procedural due process. This Court held:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbi-

trary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceedings, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e)(f). Petitioners did not avail themselves of this appropriate procedure." 305 U.S. at 226.

Yet petitioners here, availing themselves of that appropriate procedure, have been dismissed without opinion.

In 1961 this Court again had occasion to consider its interpretation of the "appropriate procedure" under such statutes as govern petitioners' actions here. At that time this Court considered, for the second time, matters relating to the Communist Party. The court had before it the decision of the Court of Appeals for the District of Columbia in *Communist Party of the United States v. Subversive Activities Control Board*, 254 F. 2d 314.[2] When this Court came to review this decision, it never reached the specific question which had occupied the Court of Appeals in this area since it found waiver of the alleged error on other grounds. 367 U.S. 1, 32. However, it was recognized here that the lower court:

> ". . . said that the Party's exclusive remedy was to move the Court of Appeals . . . for leave to adduce

[2] The decision of the Court of Appeals had been written by Judge Prettyman, who, now sitting as Senior Circuit Judge, dissented to dismissal of petitioners' causes below. It was at the time of the preparation of his 1958 decision that Judge Prettyman was presented with the argument of the government recounted in his dissent in these matters. (App., *infra*, pp. 3a-4a). The Court of Appeals accepted the argument at that time, and "Upon re-examination of the question and a re-reading of the cases cited, [Judge Prettyman] is still of the same opinion." (App. *infra*, p. 4a).

> additional evidence, and that failure to make such a motion at the time when the Board refused to order the documents produced barred the Party from later challenging the action of the Board." 367 U.S. at 30.

At the time of this Court's 1961 *Communist Party* decision, the Chief Justice also took occasion in his separate statement to comment upon *Consolidated Edison*.

> ". . . In [Consolidated Edison] an examiner for the Labor Relations Board refused to permit one of the parties to a proceeding to offer the testimony of two witnesses who had not been scheduled to appear . . . This Court recognized that the examiner's action was arbitrary, but nevertheless, it held that the party's *sole remedy* in such a situation was to make a motion for leave to adduce the additional testimony of the proffered witnesses, and that by *having failed* to pursue that remedy, *the party waived its objection*.
>
> ". . . Not only did the decision permit a clearly arbitrary ruling of an examiner to stand uncorrected, but it also *established a* cumbersome *procedure* whereby resort to the Court of Appeals was required every time the Board excluded evidence which the offering party thought should have been admitted." 367 U.S. at 121-122 (emphasis added).

Chief Justice Warren then commented that it was not necessary for this Court "to re-evaluate" the holding of *Consolidated Edison* at that time since he felt that the holding was limited to situations in which a party sought to introduce evidence which he had acquired independently. The situation here is that petitioners did have evidence which they had acquired and prepared independently, and which they have urged is vital to their case. Thus, even within this more narrow application of *Consolidated Edison*, the decision below is directly in conflict with that decision of this Court.

2. Conflict with Other Circuit Court Decisions

The opinion below was issued without statement from the majority. However, some indication of what prompted these holdings is available from the comments of Judge Prettyman's dissent:

> "I agree with my brethren that the granting at this stage of the proceedings of the petitions for leave to adduce additional evidence before the Commission would have several unfortunate results in relation to or affecting administrative procedure." (App., *infra*, p. 2a).

These same problems plagued Judge Prettyman when he wrote *for the majority* in 1958, and said in *Communist Party*:

> "As we read the opinion and decision in the Consolidated Edison case it means that, when proffered evidence is denied receipt . . . the profferor must apply . . . for permission to adduce the additional evidence; if he fails so to move he cannot . . . present the point on appeal . . .
>
> "It may be said that the ruling we have just outlined creates a right to interlocutory relief. . . There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it." 254 F. 2d at 325.

As Judge Prettyman had read this Court's decision, so had petitioners.

As Judge Prettyman had read this Court's decision, so had at least four other circuit court panels.[3] After *Consoli-*

[3] As noted in the dissent below, the Government urged that the view adopted by Judge Prettyman in *Communist Party* was shared by "nine cases in which . . . Circuit Courts of Appeals had so construed the *Consolidated Edison* case." App., *infra*, p. 4a.

dated Edison, one court of appeals after another was persuaded by counsel for the Federal Trade Commission and the National Labor Relations Board that that case barred them, in a proceeding brought to review, or enforce, a final administrative order, from considering error in the exclusion of evidence. The Third, Fourth, Eighth and Ninth Circuits all so held: *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968; *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214; *Wilson & Co.* v. *National Labor Relations Board*, 103 F. 2d 243; *California Lumbermen's Council* v. *Federal Trade Commission*, 115 F. 2d 178, *cert. denied* 312 U.S. 709. Counsel for the administrative agencies successfully argued that the appropriate remedy for error in an evidentiary ruling was an application for leave to adduce the excluded evidence. As an example, because the employer had not made use of this remedy the Fourth Circuit, viewing itself bound by the decision of this Court, reluctantly enforced an order of the Labor Board despite the fact that the Board had "denied the employer a fair opportunity to present important evidence relevant to its defense." *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, *supra* at 215.

Petitioners do recognize that the results achieved by these dismissals below appear to be consistent with one recent circuit court action. In *Texaco Inc.* v. *Federal Trade Commission*, 301 F. 2d 662, *cert. denied* 371 U.S. 882, the Fifth Circuit in a brief *per curiam* decision denied a petition to adduce. However, the Fifth Circuit did not consider and discuss this Court's decision in *Consolidated Edison* or the other courts of appeals decisions cited here. Hence, that decision only accents the conflict existing between the circuits and the lack of clarity in this area of the law.

What is clear is that if this Court had become concerned about the "unfortunate results in relation to . . . administrative procedure" which Judge Prettyman thought might flow from *Consolidated Edison*, it did not change that earlier decision by denying certiorari to review a case holding the contrary. *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912. Only a definite statement can change, limit or distinguish *Consolidated Edison*.

3. The Shadow on Due Process

One of the basic protections afforded within the administrative-judicial establishment is the right to review afforded an "aggrieved party." Fundamental concepts of due process are embodied in the right to have agency actions reviewed by the judiciary. But this right, this protection, becomes a will-o'-the-wisp when subject to the vagaries which now surround the protective provisions of Section 19(b) of the Natural Gas Act, and similar statutes.

It is small protection to be assured that the reviewing court shares a petitioner's belief that he has been "denied . . . a fair opportunity to present important evidence relevant to its defense" only to be told that the court will do nothing to rectify the situation because petitioner had not followed some ill-defined avenue of early appeal. This has happened in the cases noted above. It has happened to Texaco and other natural gas producers in somewhat analogous circumstances. *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149.

The confusion presently surrounding this area of judicial review of administrative action shocks the conscience and is damaging to public respect of judicial process.

It can only be removed by a clear statement from this Court, however brief.

4. The Scope of the Present Issues

The conflict, the doubt, the confusion, the multiple actions, the motions and dismissals and new actions described above and arising in this area of the law do not become the lot of the "natural gas company" alone under the Natural Gas Act. The self-same provisions which have been interpreted as providing immediate review in cases such as the present exclusion and withholding of evidence situation are found in many statutes in addition to the Natural Gas Act. Literally hundreds of actions arise daily where these matters are of prime importance to the rights of the participants. Language providing for leave to adduce evidence upon petitions to the court of appeals also appears in the Federal Power Act, 16 U.S.C. 825 (1)(b); National Labor Relations Act, 29 U.S.C. 160(e); Securities and Exchange Act, 15 U.S.C. 77(i)(a); Federal Trade Commission Act, 15 U.S.C. 45(c); Subversive Activities Control Act, 50 U.S.C. 793, and an omnibus agency act, 5 U.S.C. 1037(c).

Costly and time-consuming interlocutory appeals will have to be continued, particularly by those who may eventually seek review in a circuit which has construed this Court's *Consolidated Edison* decision as have petitioners and Judge Prettyman. If these will be "an empty gesture" simple justice dictates that the thousands operating under the statutes noted above be informed that such is the case. Surely continued uncertainty can well have "several unfortunate results in relation to . . . administrative procedure" and the principles of due process. These results should be avoided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1962

No. 17,608

Texaco Inc., Petitioner

v.

Federal Power Commission, Respondent

No. 17,652

Texaco Inc., et al., Petitioners

v.

Federal Power Commission, Respondent
Public Service Commission of The State of New York, Intervenor

No. 17,700

Sun Oil Company, Petitioner

v.

Federal Power Commission, Respondent

Public Service Commission of The State of New York, Intervenor

Before: Prettyman, Senior Circuit Judge, and Fahy and Burger, Circuit Judges, in Chambers.

ORDER

These consolidated cases came on for hearing on respondent's motions to dismiss the petitions for leave to adduce additional evidence and for a writ of mandamus and were argued by counsel.

Upon consideration whereof and upon consideration of the supplemental memoranda of the parties filed herein, it is

ORDERED by the court that respondent's motions to dismiss petitioners' petitions for leave to adduce additional evidence and for a writ of mandamus are hereby granted and the petitions are hereby dismissed.

Per Curiam

Dated: June 24, 1963

Senior Circuit Judge Prettyman dissents for the reasons stated in his memorandum this day filed.

Each judge reserves the right to file an opinion or a statement of his views at a later date.

United States Court of Appeals
for the District of Columbia Circuit

Nos. 17608, 17652, 17700 — *Texaco Inc., et al. v. F. P. C.*

PRETTYMAN, *Senior Circuit Judge*, dissenting: I agree with my brethren that the granting at this stage of the proceedings of the petitions for leave to adduce additional evidence before the Commission would have several unfortunate results in relation to or affecting administrative procedure. But it seems to me that we are bound by the ruling of the Supreme Court in the Consolidated Edison case.[1] That case involved a petition to review an order of the National Labor Relations Board. In the course of the hearing before the Board the companies, which were the respondents, proffered the testimony of two witnesses, and the hearing examiner rejected the proffer. Before the Court of Appeals the companies contended that this rejection

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

deprived the hearing of its necessary fairness. The contention was pressed in the Supreme Court. That Court said:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)-(f).[5] Petitioners did not avail themselves of this appropriate procedure.
>
> [5] 29 U.S.C. 160(e)(f)."[2]

The Court declined to sustain the point.

When the *Communist Party* case was before us,[3] the point was made by the Party that the Board had denied production of certain memoranda to which the Party claimed it was entitled under the *Jencks* doctrine. In a memorandum filed in this court by the Board on August 2, 1957, and signed by its General Counsel, its Assistant General Counsel and an attorney from the Department of Justice, one heading was:

> *"Petitioner has waived its claim of error by failing to use the exclusive statutory remedy under Section 14(a)".*

(Section 14(a) of the Subversive Activities Control Act corresponds to Section 10(e)(f) of the National Labor Relations Act and to Section 19(b) of the Natural Gas Act,[4]

[2] *Id.* at 226.

[3] Communist Party of the United States v. Subversive Activities Control Board, 102 U.S. App. D. C. 395, 254 F. 2d 314 (1958).

[4] 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b).

relating to adducing additional evidence.) In its argument under the foregoing heading the Government said:

> "Assuming, *arguendo*, that the failure to order production of the documents in question was error, petitioner is barred from relief because it has failed to invoke its statutory remedy, section 14(a) of the Act. Substantially the same provision in the National Labor Relations Act (29 U.S.C. 160(e)) and the Federal Trade Commission Act (15 U.S.C. 45 (c)) has been held to be an exclusive remedy under circumstances analogous to those here presented. The Supreme Court and several circuits have so held. Not having invoked it, petitioner is now precluded from doing so."

The Government then discussed the *Consolidated Edison* case and named nine cases in which it said Circuit Courts of Appeals had so construed the *Consolidated Edison* case. The Government said that the petitioner's request in that case for production of the documents fitted squarely into the purposes of the procedure set forth in the statutory provisions mentioned. The Government said, "Petitioner is, therefore, barred from the relief sought on the document questions under *Consolidated Edison*, and the other cases cited, *supra*, to the same effect." We agreed with the argument thus made by the Government and so construed the *Consolidated Edison* case in our opinion in the *Communist Party* case.[3] In so doing we pointed to the apparent results of the ruling and said: "There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it."

Upon reexamination of the question and a re-reading of the cases cited, I am still of the same opinion. It seems to me that the Supreme Court said quite clearly that if proffered evidence is rejected the profferor has an exclusive remedy, which is a motion in the Court of Appeals for leave to

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[3] *Supra* note 3, 102 U.S. App. D.C. at 403-404, 254 F. 2d at 322-323.

adduce the evidence, and if he does not make that motion he cannot raise the point upon a petition to review the final order. In saying that the profferor of the evidence must make such a motion in the Court of Appeals, it seems to me that the Court must have meant that the Court of Appeals must pass upon the motion; it does not seem to me that the Court could have meant that the profferor should merely file the motion as an empty gesture for the record. This latter is the effect of the contention now made to us by the Commission. Its contention is that the motion to adduce additional evidence can only be made when there is both a final agency order and a petition to review that order filed in the Court of Appeals. The motion should then be made to the court, prior to submission of the case on the merits, the court to dispose of the motion either at that point or in reviewing the order of which review is sought. But, absent the specific motion following a petition to review the final agency order, and prior to submission of the case, the profferor of rejected evidence is forever precluded from raising the issue of the admissibility of that evidence. This suggestion on the part of the Commission seems to me to be the suggestion of a wholly meaningless gesture on the part of the profferor of rejected evidence, and I do not think the Supreme Court meant that it was necessary for such an empty gesture to be made. To say that a motion to adduce the evidence must be made to the Court of Appeals, that such a motion can be made only after a final order is entered by the Commission and a petition to review has been filed, but that the point cannot be part of the petition to review and cannot be argued unless a separate motion has been made in such manner and at such time, makes no sense to me.

Since I am writing for myself alone, I feel free to say that I hope the Supreme Court will agree with my brethren and will conclude that I misconstrue the opinion in the *Consolidated Edison* case.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752	9
Amerada Petroleum Corp., 28 FPC 396	5
Amerada Petroleum Corp., 29 FPC 171	5, 6
Communist Party of the United States v. *Subversive Activities Control Board*, 254 F. 2d 314	10, 11
Communist Party of the United States v. *Subversive Activities Control Board*, 277 F. 2d 78 affirmed, 367 U.S. 1	11
Consolidated Edison Co. v. *National Labor Relations Board*, 95 F. 2d 890, affirmed with modification, 305 U.S. 197	10, 11
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U.S. 802	9
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U.S. 375	9
Macauley v. *Waterman Steamship Corp.*, 327 U.S. 540	9
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41	9
Securities & Exchange Commission v. *Otis & Co.*, 338 U.S. 843	9
Skelly Oil Company, 28 FPC 401	4, 5
Sun Oil Co. v. *Federal Power Commission*, No. 20868 (C.A. 5)	9
Texaco Inc. v. *Federal Trade Commission*, 301 F. 2d 662, certiorari denied, 371 U.S. 822	9

Statutes: Page

Federal Power Act, 49 Stat. 860, Section 313 (b), as emended, 16 U.S.C. 825l(b) 9

Federal Trade Commission Act, Section 5(c), 38 Stat. 719, as amended, 15 U.S.C. 45(c) 9

National Labor Relations Act, 49 Stat. 454, Section 10(e), as amended, 29 U.S.C. 160(e) 9

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*:

Section 4, 15 U.S.C. 717c 6

Section 5, 15 U.S.C. 717d 6

Section 7, 15 U.S.C. 717f 4, 6

Section 19(b), 15 U.S.C. 717r(b) 2-4, 7, 8, 9

Securities and Exchange Act, 48 Stat. 80, Section 9(a), as amended, 15 U.S.C. 77i(a) 9

Subversive Activities Control Act, 64 Stat. 1001, Section 14(a), as amended, 50 U.S.C. 793(a) 9

Miscellaneous:

Federal Power Commission Rules of Practice and Procedure:

Section 2.56, 18 C.F.R. 2.56:

General Policy Statement No. 61-1, 24 F.P.C. 818 (25 F.R. 9578) 4, 6

Fifth Amendment, General Policy Statement No. 61-1, 28 F.P.C. 441 (27 F.R. 8918) 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 475

TEXACO INC., AMERADA PETROLEUM CORPORATION, GULF OIL CORPORATION, JAKE L. HAMON, HUMBLE OIL & REFINING COMPANY, SOHIO PETROLEUM COMPANY, EMORY M. SPENCER, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 13-29)[1] is not reported. The order of the Federal

[1] The reference in the text is to the Appendix to the petition in this Court. Other reference abbreviations, *infra*, will be "P.R." for Texaco's Petition and Appendix in No. 17608 below; "M.R." for petitioners' Petition and Appendix in No. 17652 below and "Resp. R." for respondent's Appendix in No. 17608 below.

Power Commission is reported at 29 FPC 171 (Preliminary Print).

JURISDICTION

The judgment of the court of appeals was entered June 24, 1963, (Pet. App. 1a-2a). The petition for a writ of certiorari was filed September 17, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether Section 19(b) of the Natural Gas Act authorizes an interlocutory appeal from an evidentiary ruling of the Federal Power Commission while the administrative proceeding is still in progress and before a final order of the Commission has issued.

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b), provides in relevant part:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the

application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence shall

be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. * * *

STATEMENT

Petitioners are independent producers of natural gas. Each has filed an application, pursuant to Section 7 of the Natural Gas Act (15 U.S.C. 717f), for a certificate of convenience and necessity authorizing it to initiate the sale of natural gas to an interstate pipeline company from the southern Gulf Coast producing area of Texas. All of these applications were consolidated by the Commission for hearing in a single proceeding, *Amerada Petroleum Coproration, et al.*, Docket Nos. CI 62-1544, *et al.*

All of the applications are based upon contracts executed subsequent to September 28, 1960, the date on which the Commission issued its Statement of General Policy No. 61-1 (24 FPC 818, 25 F.R. 9578, 18 C.F.R. 2.56), fixing 18 cents per MCF as the guideline for determining whether a sale should be [redacted] in the area in question. In another proceeding, the Commission, by order dated August 30, 1962, determined that 15 cents was the "in-line" price for contracts entered into prior to September 28, 1960 (Resp. R. a155; *Skelly Oil Co.*, 28 FPC 401, 412). At the same time, it issued its Fifth Amendment to the Statement of General Policy No. 61-1, reducing the guideline price in this area from 18 to 16 cents per MCF (28 FPC 441-442; 27 F.R. 8918). And, in its August 30 order mentioned above, it announced that in a future proceeding—*i.e.*, the proceeding in-

volved in the instant case—involving contracts executed between September 28, 1960 and August 30, 1962, the parties would:

> * * * have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited by the 15-cent per Mcf price which we have found was the in-line price as of September 28, 1960, the 16-cent per Mcf price we are adopting as the ceiling price applicable to all future contracts in this area (pending completion of the governing area price hearings), or the 18-cent per Mcf price established on September 28, 1960.[2]

The Commission later[3] explained:

> Our reference in *Skelly* to the fact that the producers in these proceedings would be free to show whether the in-line price at the time of their contracts was the original ceiling price established on September 28, 1960, the lower price found to be the in-line price prior to that date or the 16-cent price established in the 5th Amendment to the Statement of Policy does not mean that they are confined to any of these three separate prices if the relevant in-line price was in fact at some other level. By this language we meant only to convey the thought that at this

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[2] Resp. R. a156; P.R. 3a-4a; *Amerada Petroleum Co.*, 28 FPC 396, 398; *Skelly Oil Co.*, *supra*, at 412.

[3] This statement was made in the Commission's order denying rehearing of its denial of the application of petitioner Texaco for the production of documents and for a subpoena (P.R. 46a, n. 4; *Amerada Petroleum Corp.*, 29 FPC 171, 173, n. 4).

hearing all parties would have free reign to show the proper in-line price, wherever it might happen to fall.

The hearings on the applications of petitioners and others commenced on October 29, 1962, and were concluded on December 12, 1962.[4] On November 23, 1962, petitioner Texaco applied for a subpoena *duces tecum* and *ad testificandum* requiring the appearance of the Secretary of the Commission and the production generally of all written data relied on by the Commission in determining the applicable guide-line prices specified in Statement of General Policy No. 61-1 and the Fifth Amendment thereto. The application was denied, as was Texaco's petition for rehearing (P.R. 41a-52a; *Amerada Petroleum Corp.*, 29 FPC 171).

In addition, petitioners offered certain testimony and exhibits relating to natural gas supplies and production costs (M.R. App. 7-14). The hearing examiner declined to receive them in evidence. He explained that since the proceeding was not one to fix rates but to determine whether a certificate of public convenience and necessity should be granted, the issue was whether the proposed initial price was excessive compared to other sales. To this issue the proffered cost and supply data were not germane (M.R. App. 53-75).

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[4] The hearing examiner issued his initial decision July 23, 1963. Exceptions have been filed and the matter is now pending before the Commission.

Petitioners sought to appeal to the Commission from the examiner's ruling, but the appeal was rejected on the ground that the Commission's rules precluded interlocutory review (M.R. App. 76).

Petitioners thereupon petitioned the District of Columbia Circuit for leave to adduce the data and evidence which they had sought from the Commission or offered the examiner.[5] The court of appeals consolidated the petitions and, on respondent's motion, dismissed them.[6]

ARGUMENT

1. The court of appeals was clearly correct in holding that "the appropriate time to petition this Court for leave to adduce additional evidence under Section 19(b) of the Natural Gas Act is after this Court has jurisdiction over a final order of the Commission on the merits * * *." (App., *infra*, p. 22). Section 19(b) provides, in pertinent part, as follows:

> If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such

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[5] Texaco's petition also sought a writ of mandamus.

[6] The per curiam order of the court of appeals, and the dissenting opinion of Judge Prettyman, were issued on June 24, 1963, and are printed in the petition (App. 1a-5a). The opinions of Judge Burger and Judge Fahy were not issued until October 17, 1963, subsequent to the filing of the petition, and are printed (along with Judge Prettyman's dissent) in the Appendix to this brief (*infra*, pp. 13-29).

> evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission *may modify its findings as to the facts* by reason of the additional evidence so taken, and it shall file with the court *such modified or new findings*, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, *for the modification or setting aside of the original order*. [Emphasis added.]

Thus, the statute speaks in terms of, and assumes the existence of, a preexisting final order of the Commission based upon findings that might be modified by reason of the evidence sought to be adduced. What it authorizes is, not an appeal from an interlocutory order of the Commission, but an application ancillary to the usual review proceeding, initiated after the administrative proceeding has run its course and the agency has made its final determination. Here, for example, if the Commission had, by a final order, denied petitioners' certificate applications, or imposed a price condition which petitioners could not accept, they would be free under Section 19(b) to file a petition for review and, before submitting the case on the merits, seek leave to adduce excluded evidence. If the Court granted their motions, the Commission would then have an opportunity to consider whether its original findings ought not be modified in light of the additional evidence and, where appropriate, to

recommend to the Court "the modification or setting aside of the original [final] order."

The procedure prescribed by the statute thus permits the court of appeals to defer a final ruling upon the merits until a more complete record is considered by the administrative agency. But nothing in the language of Section 19(b) or of the many other statutes having similar provisions[7] suggests any intention to carve out an exception to the general rule, long recognized by this Court, that non-final rulings by administrative agencies are not appealable while the proceedings to which they relate are still pending. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375; *Securities and Exchange Commission* v. *Otis & Co.*, 338 U.S. 843; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802; *Sun Oil Company* v. *Federal Power Commission*, C.A. 5, No. 20868, order of dismissal entered October 17, 1963 (unreported). Indeed, precisely the same contentions as were made by petitioners in this case were unsuccessfully advanced by one of the same petitioners in *Texaco, Inc.* v. *Federal Trade Commission*, 301 F. 2d 662 (C.A. 5). The Court denied certiorari only last term (371 U.S. 882).

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[7] For example, Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(c); Section 313(b) of the Federal Power Act, 49 Stat. 860, as amended, 16 U.S.C. 825l(b); Section 10(e) of the National Labor Relations Act, 49 Stat. 454, as amended, 29 U.S.C. 160(e); Section 9(a) of the Securities and Exchange Act, 48 Stat. 80, as amended, 15 U.S.C. 77i(a); Section 14(a) of the Subversive Activities Control Act, 64 Stat. 1001, as amended, 50 U.S.C. 793(a).

2. The decision below is not in conflict either with this Court's decision in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, or with the decision of any court of appeals. In *Consolidated Edison*, unlike the case at bar, the petitioner appealed to the court of appeals from a final administrative order. Having filed no motion to adduce, he claimed that an assignment of error served the same purpose. The holdings of both the Second Circuit (95 F. 2d 390, 397) and of this Court (305 U.S. at 226), rejecting that contention, emphasized that the statute provided for a motion to adduce filed in the court of appeals as the appropriate remedy for the improper exclusion of evidence. The *Consolidated Edison* case does not hold, or even intimate, that to preserve one's right to review of an exclusionary ruling there must be an appeal from such a ruling prior to a final administrative order. It merely holds that exclusionary rulings must be attacked by a motion to adduce rather than by an assignment of error.

The same question was at issue in the court of appeals' cases cited by petitioner (Pet. 12), all of which involved statutory appeals from *final* administrative orders.

Petitioners' reliance upon *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314 (C.A.D.C.), is misplaced. In the first place, the proper forum for resolving conflicts within a circuit is the court of appeals itself, rather than this Court. And, in any case, the decision below

quite properly distinguished the *Communist Party* case.* This Court, we would add, in affirming the court of appeals' decision on the third appeal in the *Communist Party* case, 277 F. 2d 78, expressly stated that "we do not reach the question of the applicability of the *Consolidated Edison* case to this situation." 367 U.S. at 30.

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* That case likewise did not present a question of whether an appeal from a ruling on evidence may, or must, be taken prior to a final administrative order. The court of appeals decision reported at 254 F. 2d 314 was the second appeal from final administrative orders, and the Communist Party did not on either appeal move in the court of appeals to adduce additional evidence relating to the "Gitlow" memoranda, but relied on an assignment of error. It was not until after the court of appeals' opinion in the second appeal that the Communist Party filed a motion to adduce the "Gitlow" memoranda. Thus, the case dealt with an attempt to secure a reversal by the court of appeals of the Board's final order on account of a ruling on the production of evidence for which no motion to adduce had been filed in either the first or second appeal on the merits to the court of appeals. The court of appeals' statement that its ruling "creates a right to interlocutory relief" (254 F. 2d at 323) can be appropriately read as referring to relief during the course of the judicial, not the administrative, proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Federal Power Commission.

November 1963.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17608

TEXACO, INC., PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 17652

TEXACO, INC., ET AL., PETITIONERS,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR.

No. 17700

SUN OIL COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR.

On Respondent's Motion to Dismiss
For Want of Jurisdiction

Filed October 17, 1963

Before PRETTYMAN, *Senior Circuit Judge* and FAHY and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* These cases come before us on the consolidated petitions of Texaco, Inc. (No. 17608), Texaco, Inc. and other corporations and individuals (No. 17652), and Sun Oil Co. (No. 17700) for an order granting leave to adduce additional evidence in a hearing now pending before the respondent, Federal Power Commission. Respondent has moved to dismiss the petitions on the ground that they are premature and that this court lacks jurisdiction to consider them at this time.

The issue presented is whether this court has jurisdiction to review, in an interlocutory fashion, the Commission's exclusion of evidence in a hearing in which the Commission has not yet entered its final order.

The several petitioners before us are parties to a proceeding before the Federal Power Commission which involves petitioners' and others' applications for certificates of public convenience and necessity under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f., *Amerada Petroleum Corp.*, Docket CI 62-1544. In No. 17608, the petitioner seeks review of the Commission's refusal to reconsider its denial of petitioner's motion under 18 C.F.R. § 1.23 for production of various Commission records. In No. 17652 and No. 17700, the petitioners seek review of the examiner's rulings sustaining Commission motions to strike certain testimony of petitioners' witnesses and exclude certain exhibits and they also seek review of the Commission's denial of a request for interlocutory appeals under 18 C.F.R. § 1.28.

Petitioners assert that unless they now apply to this court for leave to adduce additional evidence under Sec-

tion 19(b) of the Natural Gas Act, 15 U.S.C. § 717r (b), during the pendency of the administrative hearing, *i.e.*, take an interlocutory appeal, that, as they read the controlling law, their right to petition the court later for leave to offer additional evidence may be lost. They rely essentially on *Communist Party* v. *Subversive Activities Control Board*, 102 U.S.App. D.C. 395, 403-05, 254 F.2d 314, 322-24 (1958), *rev'd* on other grounds, 367 U.S. 1 (1961); *Wisconsin* v. *Federal Power Commission*, 107 U.S.App.D.C. 279, 281-82, 277 F.2d 78, 81 (1959), *aff'd*, 367 U.S. 1 (1961). In its motion to dismiss the petitions, the Federal Power Commission asserts that Section 19(b) of the Natural Gas Act confers jurisdiction on this court to pass on only "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384 (1938). See also, *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F.2d 334, 337-38 (1st Cir. 1953); *Texaco, Inc.* v. *Federal Trade Commission*, 301 F.2d 662 (5th Cir.), (per curiam) *cert. denied*, 371 U.S. 822 (1962).

Section 19(b) of the Natural Gas Act delineates the jurisdiction of the Courts of Appeals to review certain orders of the Federal Power Commission.

> (b) [1] Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. [Sentence 2 omitted.] [3]

> Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. [Sentence 4 omitted.] [5] The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. [6] If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. [7] The Commission may modify its findings as to the facts by reason of the additional evidence so taken . . . . [Sentence 8 omitted.]

This statutory provision has virtually identical counterparts in the various statutes regulating judicial review of numerous other federal regulatory agencies. See Appendix.

Petitioners assert that sentence [6] of Section 19 (b) of the Natural Gas Act, *supra*, authorizes this court to review evidentiary rulings of the Commission in an interlocutory manner independent of the jurisdiction provided in sentences [1] and [3] of Section 19(b). Petitioners rely primarily on this court's opinions in *Communist Party supra*, which construed a similar statutory provision, *i.e.*, Section 14(a) of the Subversive Activities Control Act, 50 U.S.C. § 793(a). Judge Prettyman, writing for the court in those cases, said:

> As we read the opinion and decision in the Consolidated Edison case [Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 198 (1938)] it means that, when proffered evidence is denied receipt by the trial tribunal in a case in which a statute similar to Section 10(e) of the National Labor Relations Act [29 U.S.C. § 160(e)] applies, the profferor must apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence; if he fails so to move he cannot successfully present the point on appeal. 102 U.S.App.D.C. at 404, 254 F.2d at 323. (Footnote omitted).

The legal significance of this language as precedent is better understood when it is put in the context of the history of the Communist Party litigation. The evidence with which the court was concerned there was the so-called "Gitlow memoranda." The first time the Party case was before this court, we affirmed the order of the Control Board. 96 U.S.App.D.C. 66, 223 F.2d 531 (1954). At no time prior to that decision by this court did the Communist Party petition this court for leave to proffer the Gitlow memoranda either in an interlocutory fashion or by way of a petition ancillary to the general petition to review the final order of the Control Board. Our decision was reversed by the Supreme Court and the case was remanded to the Control Board. 351 U.S. 115 (1956). Subsequently we reviewed the Control Board's new order and remanded the case. The language quoted above is found in that second decision by this court. 102 U.S.App.D.C. 395, 254 F.2d 314 (1958). At the time of this court's second decision, the Communist Party had not petitioned this court for leave to adduce the memoranda. After this court's

second decision the Communist Party filed its petition for leave to adduce the memoranda, and the petition was denied.

When the case returned here a third time, we held the Party could not raise the issue relating to the Gitlow memoranda because that issue had been decided against them on the second appeal and their failure to petition this court for leave to proffer the evidence prior to that decision could not be cured *nunc pro tunc* by their subsequent petition. 107 U.S. App.D.C. at 282, 277 F.2d at 81. On the third appeal we affirmed the Control Board's order and our decision was affirmed by the Supreme Court. 367 U.S. 1 (1961). The Supreme Court explicitly refrained from deciding the applicability of the *Consolidated Edison* case to the *Communist Party* case. 367 U.S. at 30. This court's ruling on the Gitlow memoranda was sustained on another ground, namely that the Party's failure to raise the issue on its first appeal in the Supreme Court [351 U.S. 115 (1956)] precluded it from raising the point on the second appeal. 367 U.S. at 30-32.

The language and holding of this court in the second Communist Party appeal, when considered in light of the facts of that litigation, and the *Consolidated Edison* case, is not to be read as standing for the proposition that a party whose proffer of evidence is rejected in an administrative hearing must then take an interlocutory appeal from the examiner's ruling or forever forego the opportunity of judicial review of that ruling. In the Communist Party litigation, the Communist Party failed to petition this court for leave to adduce the memoranda prior to this court's first review of the Board's order, 96 U.S.App.D.C. 66, 223 F.2d 531 (1954), and the second review, 102 U.S.App.D.C. 395, 254 F.2d 314

(1958). Therefore, when the case came here the second time, the Party was in the position of having failed to raise the issue of the Gitlow memoranda because it had not sought leave of this court to adduce that evidence when it could have done so under its original petition for review.

This interpretation of the opinions in the second and third Communist Party appeals in this court is consistent with the Supreme Court's holding in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938), and in keeping with sound concepts of orderly procedure of appellate review. In *Consolidated Edison*, the National Labor Relations Board had excluded certain testimony which was offered on behalf of the employer in the course of the Board's proceedings. On petition to review the Board's *final order on the merits*, the Court of Appeals for the Second Circuit held that the exclusion of the evidence was arbitrary but it did not remand to the Board for the taking of additional evidence because the petitioner had not petitioned the court for leave to adduce the excluded evidence. The opinion of that court noted:

> However, the petitioners have not applied to this court for the taking of additional evidence, as they might under section 10(e), 29 U.S.C.A. § 160(e). 95 F.2d 390, 397 (2d Cir. 1938).

The holding of the Second Circuit was sustained by the Supreme Court. 305 U.S. 197, 226 (1938). In neither the opinion of the Court of Appeals nor the Supreme Court is there any mention of the appropriate time to petition a court of appeals for leave to adduce evidence rejected by the Board. The Supreme Court did not say that that part of Section 10(e) of the National Labor Relations Act, which provides

for petitions to adduce evidence, gave jurisdiction to the Courts of Appeals independent of the first sentence of the section which provides for appellate review of final orders on the merits.

Although the opinion is not free from ambiguity on this score, it should not be read as sanctioning interlocutory appeals to review rulings on exclusion of evidence; rather it should be read as saying that when a party petitions a court of appeals to review a *final* order of the Board on the merits, under the first sentence of Section 10(e), and fails at that stage to request leave to adduce the evidence, the court need not sua sponte remand the case for the taking of the additional evidence. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 154-56 (1941).

The provision in the several statutes (e.g., sentence [6] in Section 19(b) of the Natural Gas Act) which provides for petitions to adduce evidence is not a basis of jurisdiction independent of the first sentences; rather it provides in effect a rule of pleading in the Court of Appeals.[1] If the court rules on the petition favorably prior to argument of the petition to review the final order on the merits, it may remand at that time and eliminate the waste involved in briefing and arguing the case on the merits before the entire administrative record is made.

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[1] This interpretation of the *Communist Party* and *Consolidated Edison* cases is consistent with the Supreme Court's pronouncement in National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 234-35 (1947): "The power to adduce additional evidence granted to the Circuit Court of Appeals by § 10(e) [of the National Labor Relations Act] cannot be employed to enlarge the statutory scope of judicial review."

An independent reading of Section 19(b) of the Natural Gas Act reveals that this court's power to require the Commission to take additional evidence to supplement the record of a hearing is a corollary of the preceding sentence in the statute which provides that the Commission's findings of fact shall be conclusive if supported by substantial evidence. When read together the two sentences of the section demonstrate that the Courts of Appeals must sustain the Board's finding of fact against a challenge if the record contains substantial evidence in support; but the court may not sustain the findings of fact in the face of a petitioner's valid and timely contention that the Commission wrongfully excluded material, non-cumulative evidence. *Wheeler* v. *National Labor Relations Board*, —U.S.App.D.C.—, 314 F.2d 260 (1963). Compare *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), with *International Brotherhood of Operative Potters* v. *National Labor Relations Board*, No. 17300, D.C. Cir., June 13, 1963 (slip op. p. 4). See *National Labor Relations Board* v. *National Laundry Co.*, 78 U.S.App.D.C. 184, 138 F.2d 589 (1943).

In *Wheeler* v. *National Labor Relations Board*, *supra*, we remanded a case to the Labor Board to allow the petitioner to adduce material evidence which we found to have been wrongfully excluded by the hearing examiner, that precise point having been raised by petitioner. The petitioner did not petition this court in an interlocutory manner for leave to adduce the evidence, but rather raised the point on review after the Board's final order. We considered the petition properly timed and decided the issue in petitioner's favor, remanding so that the excluded evidence could be received.

There would seem to be no escape from a holding that the petitions for leave to adduce additional evidence are premature. In the first place, none of the parties may be aggrieved by the Commission's final order. Again, if any of them think otherwise, they may under 15 U.S.C. § 717r(a) "apply for a rehearing within thirty days after the issuance of such order." The several rulings now complained of may be challenged, and so far as we know the Commission may then rule favorably to the several petitioners. If not, or if rehearing be denied, the jurisdictional prerequisite to a review of "any order of the Commission" will then have been satisfied. Thereupon, further proceedings may follow as provided in §717r(b), and the rights of the parties may be fully considered by this court.

In short, the appropriate time to petition this court for leave to adduce additional evidence under Section 19(b) of the Natural Gas Act is after this court has jurisdiction over a final order of the Commission on the merits, pursuant to sentences [1] and [3] of Section 19(b).

The several petitions to adduce evidence are dismissed without prejudice to their renewal in conjunction with a petition to review the Commission's final order on the merits.

So ordered.

APPENDIX

Statutes Similar to Section 19(b) of the Natural Gas Act

Atomic Energy Commission:

Hobbs Act, 5 U.S.C. § 1037(c)

Attorney-General:

Settlement of International Claims Act, 22 U.S.C. § 1631g(f)*

Civil Aeronautics Board:
Antitrust Act, 15 U.S.C. § 21

Detention Review Board
Emergency Detention Act, 50 U.S.C. § 821(d)

Federal Communications Commission:
Antitrust Act, 15 U.S.C. § 21
Hobbs Act, 5 U.S.C. § 1037(c)

Federal Power Commission:
Natural Gas Act, 15 U.S.C. § 717r(b)

Federal Reserve Board:
Antitrust Act, 15 U.S.C. § 21

Federal Trade Commission:
Federal Trade Commission Act, 15 U.S.C. § 45(c)
Antitrust Act, 15 U.S.C. § 21

Interstate Commerce Commission:
Antitrust Act, 15 U.S.C. § 21

Maritime Administration:
Hobbs Act, 5 U.S.C. § 1037(c)

National Labor Relations Board:
National Labor Relations Act, 29 U.S.C. §§ 160 (e), (f)

Railroad Retirement Board:
Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f)

Secretary of Agriculture:
Packers and Stockyards Act, 7 U.S.C. § 194(f)
Federal Seed Act, 7 U.S.C. § 1600
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 346a(i)(4)
Hobbs Act, 5 U.S.C. § 1037(c)

Secretary of Commerce:
Hobbs Act, 5 U.S.C. § 1037(c)

Secretary of Health Education and Welfare:
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 346a(i)(4), 348(g)(4), 355(h), 371(f)(2)

Secretary of Labor:
Fair Labor Standards Act, 29 U.S.C. § 210(a)

Secretary of Treasury:
Federal Alcohol Administration Act, 27 U.S.C. § 204(h)
Revocation of Customhouse Brokers' Licenses, 19 U.S.C. § 1641(b)

Securities and Exchange Commission:
Securities Act, 15 U.S.C. § 77i(a)
Securities Exchanges Act, 15 U.S.C. 78y(a)
Public Utility Holding Company Act, 15 U.S.C. 79x(a)
Investment Companies Act, 15 U.S.C. §§ 80a-42(a), 80b-13(a)

Subversive Activities Control Board:
Subversive Activities Control Act, 50 U.S.C. § 793(a)

Surgeon General:
The Public Health Service Act, 42 U.S.C. § 291j(b)(2)*

United States Maritime Commission:
Hobbs Act, 5 U.S.C. § 1037(c)

United States Tariff Commission:
Tariff Act of 1930, 19 U.S.C. § 1337(c)

Washington Metropolitan Area Transit Commission:
Compact for Mass Transportation (Washington, D.C., Maryland, Virginia.)

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* Variant.

FAHY, *Circuit Judge, concurs in the result.* I agree that Section 19(b) of the Natural Gas Act does not authorize this court to review evidentiary rulings of the Commission in an interlocutory manner independent of the provisions of that section governing the jurisdiction of this court. *Cf. Pan American Petroleum Corp.* v. *Federal Power Commission, et al.*, —— U.S. App. D.C. ——, —— F.2d —— (1963). I do not read *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938), decided under the provisions governing review of orders of the Labor Board, as in any manner inconsistent with this position.

PRETTYMAN, *Senior Circuit Judge*, dissenting: I agree with my brethren that the granting at this stage of the proceedings of the petitions for leave to adduce additional evidence before the Commission would have several unfortunate results in relation to or affecting administrative procedure. But it seems to me that we are bound by the ruling of the Supreme Court in the *Consolidated Edison* case.[1] That case involved a petition to review an order of the National Labor Relations Board. In the course of the hearing before the Board the companies, which were the respondents, proffered the testimony of two witnesses, and the hearing examiner rejected the proffer. Before the Court of Appeals the companies contended that this rejection deprived the hearing of its necessary fairness. The contention was pressed in the Supreme Court. That Court said:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938).

> contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)(f). Petitioners did not avail themselves of this appropriate procedure.
>
> [5] 29 U.S.C. 160(e)(f)."[6]

The Court declined to sustain the point.

When the *Communist Party* case was before us, the point was made by the Party that the Board had denied production of certain memoranda to which the Party claimed it was entitled under the *Jencks* doctrine. In a memorandum filed in this court by the Board on August 2, 1957, and signed by its General Counsel, its Assistant General Counsel, and an attorney from the Department of Justice, one heading was:

> *"Petitioner has waived its claim of error by failing to use the exclusive statutory remedy under section 14(a)"*

(Section 14(a) of the Subversive Activities Control corresponds to Section 10(e)(f) of the National Labor Relations Act and to Section 19(b) of the Na-

[6] *Id.* at 226.

[7] Communist Party of the United States v. Subversive Activities Control Board, 102 U.S. App. D.C. 395, 254 F.2d 344 (1958).

tural Gas Act,[1] relating to adducing additional evidence.) In its argument under the foregoing heading the Government said:

> "Assuming, *arguendo*, that the failure to order production of the documents in question was error, petitioner is barred from relief because it has failed to invoke its statutory remedy, section 14(a) of the Act. Substantially the same provision in the National Labor Relations Act (29 U.S.C. 160(e)) and the Federal Trade Commission Act (15 U.S.C. 45(e)) has been held to be an exclusive remedy under circumstances analogous to those here presented. The Supreme Court and several circuits have so held. Not having invoked it, petitioner is now precluded from doing so."

The Government then discussed the *Consolidated Edison* case and named nine cases in which it said Circuit Courts of Appeals had so construed the *Consolidated Edison* case. The Government said that the petitioner's request in that case for production of the documents fitted squarely into the purposes of the procedure set forth in the statutory provisions mentioned. The Government said: "Petitioner is, therefore, barred from the relief sought on the document questions under *Consolidated Edison*, and the other cases cited, *supra*, to the same effect." We agreed with the argument thus made by the Government and so construed the *Consolidated Edison* case in our opinion in the *Communist Party* case.[2] In so doing we referred to the apparent results of the ruling and said: "The re-

[1] 52 STAT. 831 (1938), as amended, 15 U.S.C. § 717r(b).

[2] *Supra* note 3, 102 U.S. App. D.C. at 403-404, 254 F.2d at 322-323.

is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it."

Upon reexamination of the question and a rereading of the cases cited, I am still of the same opinion. It seems to me that the Supreme Court said quite clearly that if proffered evidence is rejected the proferor has an exclusive remedy, which is a motion in the Court of Appeals for leave to adduce the evidence, and if he does not make that motion he cannot raise the point upon a petition to review the final order. In saying that the proferor of the evidence must make such a motion in the Court of Appeals, it seems to me that the Court must have meant that the Court of Appeals must pass upon the motion; it does not seem to me that the Court could have meant that the proferor should merely file the motion as an empty gesture for the record. This latter is the effect of the contention now made to us by the Commission. Its contention is that the motion to adduce additional evidence can only be made when there is both a final agency order and a petition to review that order filed in the Court of Appeals. The motion should then be made to the court, prior to submission of the case on the merits, the court to dispose of the motion either at that point or in reviewing the order of which review is sought. But absent the specific motion following a petition to review the final agency order and prior to submission of the case, the proferor of rejected evidence is forever precluded from raising the issue of the admissibility of that evidence. This suggestion on the part of the Commission seems to me to be the suggestion of a wholly meaningless gesture on the part of the proferer of rejected evidence and I do not think the Supreme Court meant that it was

necessary for such an empty gesture to be made. To say that a motion to adduce the evidence must be made to the Court of Appeals, that such a motion can be made only after a final order is entered by the Commission and a petition to review has been filed, but that the point cannot be part of the petition to review and cannot be argued unless a separate motion has been made in such manner and at such time, makes no sense to me.

Since I am writing for myself alone, I feel free to say that I hope the Supreme Court will agree with my brethren and will conclude that I misconstrue the opinion in the *Consolidated Edison* case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 475

TEXACO INC., AMERADA PETROLEUM CORPORATION, GULF OIL CORPORATION, JAKE L. HAMON, HUMBLE OIL & REFINING COMPANY, SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,
Petitioners,

v.

FEDERAL POWER COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY AND SUPPLEMENTAL STATEMENT OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The motions to adduce evidence were filed in the Court below because it appeared to Petitioners that such action was required under Section 19 of the Natural Gas Act and Court decisions interpreting similar statutes. Since the filing of the Petition for Writ of Certiorari here, the majority judges below have written an opinion, and we now have the response in opposition to the petition filed by the Solicitor General on behalf of the Respondent, Federal Power Commission. These statements merely underline the need for a statement from this Court, however brief, which will remove the confusion which now surrounds this significant statutory language[1] — significant in that failure to under-

[1] The opinion below is printed in the Brief in Opposition (herein referred to as "Brief") at pages 13-29. As noted in the majority opinion, language similar to that of Section 19 (b) of the Natural Gas Act appears in some twenty-five other statutes.

stand and follow it can result in the waiver of fundamental rights to judicial review of agency actions.

In the brief in opposition we are told that this Court's decision in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938), and the plain language of the statute merely mean "that exclusionary rulings *must be* attacked by a motion to adduce rather than by an assignment of error". (Brief, p. 10)[2] However, the very cases cited by the majority below in their discussion of the powers flowing under Section 19(b) of the Natural Gas Act are situations where the matters were remanded although the cases arose on petitions to review and *not* as a result of motions to adduce. (Brief, p. 21, reference to *International Brotherhood of Operative Potters v. National Labor Relations Board*, 320 F. 2d 757 (C.A.D.C. 1963), and *Wheeler v. National Labor Relations Board*, 314 F. 2d 260 (C.A.D.C. 1963)). Thus, the lack of clarity still surrounding these matters is well illustrated.

We are also told that the statute is clear ". . . and assumes the existence of a pre-existing final order of the Commission . . . What it authorizes is not an appeal from an interlocutory order of the Commission . . ." (Brief, p. 8).

But after reading and construing the statutes:

(a) The majority in *Communist Party of the United States v. Subversive Activities Control Board*, 254 F. 2d 314 (C.A.D.C. 1954), said:

> "It may be said that the ruling we have just outlined creates a right to interlocutory relief . . ." 254 F. 2d 323.

(b) Commenting on the ruling referred to in (a), Mr. Chief Justice Warren said in *Communist Party of the*

[2] Emphasis added throughout, unless otherwise noted.

United States v. *Subversive Activities Control Board*, 367 U.S. 1 (1961):

> ". . . but it also establishes a cumbersome procedure whereby resort to the Court of Appeals was required *every time* the Board excluded evidence . . ." 367 U.S. at 122.

(c) The Solicitor General in his brief to this Court in the *Communist Party* case said:

> "Petitioner's difficulties with Section 14(a) clearly reflects the erroneous belief that this provision is merely a procedural technicality. Instead, it serves the useful *purpose of allowing interlocutory relief* in situations where the administrative agency's time and effort would often be wasted if appeal from the final order were the only remedy. And even if the injured party does not seek interlocutory relief — and Section 14(a) does not seem to compel it — the reviewing Court can consider the motion to adduce separately and expedite the remand to the administrative agency if the agency has erred. Nor is Petitioner correct in stating . . . that the *Consolidated Edison* holding would produce *multiple interlocutory appeals*. Despite the existence of that decision for many years, such multiple appeals have not apparently resulted; probably because administrative agencies generally give parties before them great latitude in adducing evidence." Brief for Respondent, p. 310.

The diverse interpretations and lack of clarity surrounding the statutory language and court rulings on motions to adduce are further illustrated by various arguments of the Solicitor General on this subject. In the *Communist Party* brief, quoted above, the interpretation was that the statutory language provides for the interlocutory relief of a motion to adduce "but *does* **not** *compel* it." This statement was later interpreted by the Solicitor General to point out that "interlocutory" meant at the time ". . . the court had

a final agency order before it."[3] But we are now told that when the court has a final action before it, the statute *does compel* a motion to adduce since ". . . exclusionary rulings *must* be attacked by a motion to adduce . . ." Brief, p. 10.

CONCLUSION

As noted in the Petition, these costly and time-consuming procedural appeals must be continued until some clarification is forthcoming to protect litigants and to assure that waiver of review does not occur. This Court's own rules provide that review is given here to those situations where conflict and confusion exist. Because of the conflict herein noted, and that pointed out in the original petition, it is urged that the petition for a writ of certiorari should be granted.

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[3] *Texaco Inc. v. Federal Trade Commission*, 371 U.S. 822 (1962), Brief for the Respondent in Opposition, p. 10, note 5.

Respectfully submitted,

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